

## **RECORD OF PROCEEDINGS**

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2023-02487

XXXXXXXXXXXX

**COUNSEL:** NONE

**HEARING REQUESTED:** NO

### **APPLICANT'S REQUEST**

Her official military personnel records be amended to reflect 20 satisfactory years of service.

### **APPLICANT'S CONTENTIONS**

Her Medical Evaluation Board (MEB) retired her at 19 years, 9 months, and 4 days. This is a huge injustice and has not allowed her to collect her retirement from the military due to her missing 86 days. She was medically retired due to Stage 4 colon cancer and had no choice but to accept the outcome of the MEB; however, not being able to accept her retirement (\$3,700.00) due to 86 days is uncalled for and is an injustice to not only her, but to her family as well. All of her retirement is being taken from her due to her not having 20 years satisfactory service. Evidently, you must have 20 years satisfactory service in order to draw your retirement and Department of Veterans Affairs (DVA) disability check. None of this was briefed during the MEB process and she found out about it when she received her DVA letter in the mail a month after she retired.

She feels she has honorably served 19 years, 9 months, and 4 days in the United States Air Force and would have served well beyond that if she had the chance. Unfortunately, she was diagnosed with Stage 4 colon cancer with no previous history or family history of colon cancer. All genetics tests were clear, with no sign of colon cancer in her genetic makeup. She was told by her doctor it is just one of those things, and she has approximately three years of life. She did not choose to be retired, nor did she choose this disease. She feels the MEB process failed her. She feels she is entitled to her retirement pay and her DVA compensation. In order for this to happen, she must have 20 satisfactory years of service.

In Dec 21, she was diagnosed with Stage 4 colon cancer and immediately informed her medical group and command. She had a colectomy in Jan 22, followed by two additional surgeries by mid-Mar 22. In Jun 22, while undergoing chemotherapy, she was contacted by her Physical Evaluation Board Liaison Officer (PEBLO), who told her he was new and had previously worked with the Army. She was briefed by a DVA representative, and appointments were made for her medical evaluations. She told the DVA representative and her PEBLO she was still having medical issues in hopes of holding off her MEB, but the PEBLO told her she could fight the MEB, but the case would not change even though she was going through chemotherapy and experiencing medical issues. The process continued and the Department of Defense (DoD) came back with a 100 percent disability rating. The DVA also awarded a 100 percent rating. The DVA representative and PEBLO briefed her again and she was processed for her medical retirement.

Prior to retiring, she was still going through medical issues and her Force Support Squadron (FSS) contacted the National Guard Bureau (NGB) via email to see if she could be extended due to these medical issues; the FSS never heard back from NGB. The applicant retired in Mar 23, and a month later received a letter from the DVA regarding her benefits and entitlements. At the bottom of the page there was a section about having 20 years of service in order to draw her

retirement and DVA compensation. At this point she was very confused because that had not been briefed by her PEBLO or DVA representative. This was not caught, and she feels it is a huge fault in the system. She should have been briefed on Concurrent Retirement and Disability Pay (CRDP) being that close to serving 20 years. If the PEBLO had taken an active role in her case, he would have seen this and assisted her in ensuring she reached 20 years' service. Instead, all of her retirement pay is taken from her because she did not have 86 days. She could not believe the DVA paperwork and waited for her retirement record to be created to see for herself. After 45 days past her retirement, she contacted the Defense Finance and Accounting Service (DFAS). After 91 days, her record was created, and all her retirement pay was taken. The futures of servicemembers are in the hands of the staff in the MEB process and it is disheartening that their lack of knowledge or attention has made a long-lasting impact on her family.

The applicant's complete submission is at Exhibit A.

## **STATEMENT OF FACTS**

The applicant is a retired [State] Air National Guard master sergeant (E-7).

On 8 Sep 22, according to AF IMT 618, *Medical Board Report*, the applicant was diagnosed with malignant carcinoma and referred to the Informal Physical Evaluation Board (IPEB).

On 18 Nov 22, according to AF Form 356, *Findings and Recommended Disposition of USAF Physical Evaluation Board (Informal)*, the applicant was diagnosed with:

### **Category I – Unfitting Conditions:**

- Malignant carcinoma; DVA rated as: Malignant carcinoma colon cancer S/P resection of large intestine, with fatigue, shortness of breath associated with chemotherapy, irritable bowel syndrome, intestinal neoplasm, gastroesophageal reflux disease, erosive gastritis, polyps on liver; Veterans Administration Schedule for Rating Disabilities (VASRD) Code 7343; Disability Rating: 100 percent; Condition is permanent and stable.

- DVA rated as malignant carcinoma metastasized to lymph nodes abdominal wall with associated abdominal pain, with associated iron deficiency anemia, pernicious anemia or other B12 deficiency anemia; VASRD Code 7799-7715; Disability Rating: 100 percent; Condition is permanent and stable.

- DVA rated as: Scar, neck from chemo port insertion; VASRD Code 7800; Disability Rating: 0 percent; Condition is permanent and stable.

- DVA rated as: scars, anterior trunk from colon resection, chemo port placement; VASRD Code 7802; Disability Rating: 0 percent; Condition is permanent and stable.

IPEB recommended permanent retirement with a combined compensable percentage of 100 percent.

On 29 Nov 22, according to a *Legal Representation Form*, the applicant declined to request an attorney from the Office of Disability Counsel to represent her in the Disability Evaluation Process (DES). On this same date, according to AF Form 1180, *Action on Physical Evaluation Board Findings and Recommended Disposition*, the applicant agreed with the findings and recommended disposition of the IPEB and waived her rights for any further appeal. She did not request a one-time reconsideration of the DVA disability ratings for the conditions found unfitting by the IPEB. The Secretary of the Air Force directed the applicant be permanently retired under the provisions of Title 10, United States Code, Section 1201 (10 USC § 1201) with a compensable percentage for physical disability of 100 percent.

On 16 Mar 23, according to Special Order Number XXXX, dated 6 Dec 22, the applicant was relieved from active duty, organization, and station of assignment. Effective 17 Mar 23, she was

permanently disability retired in the grade of master sergeant with a compensable percentage for physical disability of 100 percent. She was credited with 19 years, 9 months, and 4 days service for basic pay, 11 years, 1 month, and 21 days active service for retirement, and service per 10 USC § 12733 of 13.39 (4823 points).

On 1 Apr 23, according to a DVA Rating Decision, provided by the applicant, she was awarded service-connection for malignant carcinoma colon cancer S/P resection of large intestine, with fatigue, shortness of breath associated with chemotherapy, irritable bowel syndrome, intestinal neoplasm, gastroesophageal reflux disease, erosive gastritis, polyps on liver and evaluated at 100 percent, effective 17 Mar 23. She was also awarded service-connection for malignant carcinoma metastasized to lymph nodes abdominal wall with associated abdominal pain, with associated iron deficiency anemia, pernicious anemia or other B12 deficiency anemia and evaluated at 100 percent, effective 17 Mar 23. The applicant was also evaluated for other conditions not addressed by the IPEB.

On 5 Apr 23, according to a DVA letter to the applicant, provided by the applicant, she was notified of the DVA rating decision on her benefits/entitlements.

For more information, see the excerpt of the applicant's record at Exhibit B and the advisory at Exhibit C.

#### **APPLICABLE AUTHORITY/GUIDANCE**

10 USC § 12731 – *Age and service requirements.* (Excerpt)

(a) Except as provided in subsection (c), a person is entitled, upon application, to retired pay computed under section 12739 of this title, if the person:

- (1) has attained the eligibility age applicable under subsection (f) to that person;
- (2) has performed at least 20 years of service computed under section 12732 of this title;

(f)

(1) Subject to paragraph (2), the eligibility age for purposes of subsection (a)(1) is 60 years of age.

10 USC § 12732 – *Entitlement to retired pay: computation of years of service.* (Excerpt)

(a) Except as provided in subsection (b), for the purpose of determining whether a person is entitled to retired pay under section 12731 of this title, the person's years of service are computed by adding the following:

(2) Each one-year period, after July 1, 1949, in which the person has been credited with at least 50 points on the following basis:

(A) One point for each day of—

(i) active service; or

(ii) full-time service under sections 316, 502, 503, 504, and 505 of title 32 while performing annual training duty or while attending a prescribed course of instruction at a school designated as a service school by law or by the Secretary concerned; if that service conformed to required standards and qualifications.

(B) One point for each attendance at a drill or period of equivalent instruction that was prescribed for that year by the Secretary concerned and conformed to the requirements prescribed by law, including attendance under section 502 of title 32.

(C) Points at the rate of 15 a year for membership—

(i) in a reserve component of an armed force.

38 USC § 5304 - *Prohibition against duplication of benefits.* (Excerpt)

(a)

(1) Except as provided in section 1414 of title 10 or to the extent that retirement pay is waived under other provisions of law, not more than one award of pension, compensation, emergency officers', regular, or reserve retirement pay, or initial award of naval pension granted after July 13, 1943, shall be made concurrently to any person based on such person's own service or concurrently to any person based on the service of any other person.

38 USC § 5305 - *Waiver of retired pay.*

Except as provided in section 1414 of title 10, any person who is receiving pay pursuant to any provision of law providing retired or retirement pay to persons in the Armed Forces, or as a commissioned officer of the National Oceanic and Atmospheric Administration or of the Public Health Service, and who would be eligible to receive pension or compensation under the laws administered by the Secretary if such person were not receiving such retired or retirement pay, shall be entitled to receive such pension or compensation upon the filing by such person with the department by which such retired or retirement pay is paid of a waiver of so much of such person's retired or retirement pay as is equal in amount to such pension or compensation. To prevent duplication of payments, the department with which any such waiver is filed shall notify the Secretary of the receipt of such waiver, the amount waived, and the effective date of the reduction in retired or retirement pay.

10 USC § 1414 - *Members eligible for retired pay who are also eligible for veterans' disability compensation for disabilities rated 50 percent or higher: concurrent payment of retired pay and veterans' disability compensation.* (Excerpt)

(a) *Payment of Both Retired Pay and Compensation.*

(1) *In general.* Subject to subsection (b), a member or former member of the uniformed services who is entitled for any month to retired pay and who is also entitled for that month to veterans' disability compensation for a qualifying service-connected disability (hereinafter in this section referred to as a "qualified retiree") is entitled to be paid both for that month without regard to sections 5304 and 5305 of title 38.

(b) *Special Rules for Chapter 61 Disability Retirees.*

(1) *Career retirees.*

The retired pay of a member retired under chapter 61 of this title with 20 years or more of service otherwise creditable under section 1405 of this title, or at least 20 years of service computed under section 12732 of this title, at the time of the member's retirement is subject to reduction under sections 5304 and 5305 of title 38, but only to the extent that the amount of the member's retired pay under chapter 61 of this title exceeds the amount of retired pay to which the member would have been entitled under any other provision of law based upon the member's service in the uniformed services if the member had not been retired under chapter 61 of this title.

(2) *Disability retirees with less than 20 years of service.*

Subsection (a) does not apply to a member retired under chapter 61 of this title with less than 20 years of service otherwise creditable under section 1405 of this title, or with less than 20 years of service computed under section 12732 of this title, at the time of the member's retirement.

## **AIR FORCE EVALUATION**

NGB/A1PS recommends denying the application. Based on the documentation provided by the applicant and analysis of the facts, there is no evidence of an error or injustice.

The advisor reviewed the submitted package in its entirety. Based on the package provided, the advisor confirms the applicant was diagnosed with Stage 4 colon cancer on 15 Dec 21. The

DVA provided a letter to the applicant on 5 Apr 23 notifying her of their decision evaluating disability benefits at 100 percent, effective 17 Mar 23.

Title 38, Chapter 53, Section 5304 (38 USC § 5304) prohibits against duplication of benefits. The applicant waived her military retired pay in order to receive DVA disability compensation. In accordance with DoD 7000.14-R, *Financial Management Regulation*, Volume 7B, Chapter 12, paragraph 1.1.1.1., 38 USC § 5305 permits a member to waive retired pay in order to receive compensation or pension from the DVA.

The applicant's alleged injustice stems from receiving a letter from the DVA that reflected the requirement for 20 years of service in order to draw her retirement pay and DVA compensation (CRDP). CRDP is an exception to the 38 USC § 5304 prohibition against duplication of benefits. Under CRDP, servicemembers are eligible to receive both military pay and DVA disability compensation concurrently. CRDP eligibility requires completion of 20 years or more of active service, entitlement to both military disability retired pay and DVA disability compensation, and a service-connected disability rated by the Secretary of Veterans Affairs not less than 50 percent.

The applicant's retirement order shows she has 19 years, 9 months, and 4 days of satisfactory service. Additionally, of that satisfactory service, 11 years, 1 month, and 21 days were active service for retirement. Her eligibility was not denied for 86 days to reach 20 years of satisfactory service, but denied for 8 years, 11 months, and 10 days, to reach 20 years Total Active Federal Military Service (TAFMS). To receive the requested CRDP, the applicant must complete an additional 8 years, 11 months, and 10 days of service creditable under 10 USC § 1405, or 20 years of service computed under 10 USC § 12732, by the time of her retirement.

The complete advisory opinion is at Exhibit C.

## **APPLICANT'S REVIEW OF AIR FORCE EVALUATION**

The Board sent a copy of the advisory opinion to the applicant on 21 Feb 24 for comment (Exhibit D), and the applicant replied on 23 Feb 24. In her response, the applicant contended she does not agree with the advisory opinion's recommendation to deny her case. In the advisory opinion, it states the applicant completed 11 years, 1 month, and 21 days of TAFMS, and to receive CRDP, she would have to complete an additional 8 years, 11 months, and 10 days of service creditable under 10 USC § 1405, or 20 years of service computed under 10 USC § 12732. Eligibility for CRDP does not require 20 years TAFMS as stated in the advisory opinion. It does also reflect 20 years of service under 10 USC 12732. With the additional 86 days, she would be eligible for retirement under 10 USC 12732. Active, Guard/Reserve are all points that count toward years of service for retired pay. The advisory opinion denies a request not for 86 days, but for 8 years, 11 months, and 10 days of service. She is not requesting, nor does she need 8 years, 11 months, and 10 days; she needs 86 days to be eligible for retirement with 20 years of service and to be eligible for CRDP. In support she provided CRDP eligibility requirements from the DFAS website that reflects Special Rules for Chapter 61 Disability Retirees, which states members retired for disability under Chapter 61 of Title 10, USC may be entitled to CRDP only if they have at least 20 years of service qualifying for Regular or Reserve retirement. The website goes on to list the additional requirements. The only reason she is not eligible for CRDP is because she is short 86 days due to an injustice she incurred during her MEB processing. If her PEBLO had not told her she would be receiving both DVA disability and military retirement pay, she would have taken her case to gain legal assistance. She served 19 years, 9 months, and 4 days and would have served well beyond if she had not received news of having Stage 4 colon cancer. It is very disheartening to know that she served proudly in the Air Force for nearly 20 years, only to be lied to by the very people that are the trusted PEBLO

representatives giving misinformation. She requests the Board's consideration in granting her the 86 days needed to reach retirement at 20 years of service which will entitle her to CRDP.

The applicant's complete response is at Exhibit E.

## **FINDINGS AND CONCLUSION**

1. The application was timely filed.
2. The applicant exhausted all available non-judicial relief before applying to the Board.
3. After reviewing all Exhibits, to include the applicant's rebuttal, the majority of the Board concludes the applicant is not the victim of an error or injustice. The majority of the Board concurs with the rationale and recommendation of NGB/A1PS and finds a preponderance of the evidence does not substantiate the applicant's contentions. The applicant was afforded due process via the IPEB, she was offered, and declined, Office of Disability Counsel representation, and concurred with the findings and recommended disposition of the IPEB, waiving her right for further appeal. The applicant's date of separation and subsequent retirement date were established using existing Air Force guidance. The majority of the Board further notes the applicant appears to suggest award of 86 days credit would result in her eligibility for immediate receipt of CRDP; however, reserve component members with 20 years satisfactory service, and not 20 years TAFMS, toward retirement who are disability retired with a disability rating of 50 percent or greater do not draw CRDP until they reach the age where they would have normally began receiving retired pay (age 60), and then only in an amount equal to what they would have received at eligibility age had they not been retired under Chapter 61. Therefore, the majority of the Board recommends against correcting the applicant's records.

## **RECOMMENDATION**

The majority of the Board recommends informing the applicant the evidence did not demonstrate material error or injustice, and the Board will reconsider the application only upon receipt of relevant evidence not already presented.

## **CERTIFICATION**

The following quorum of the Board, as defined in Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2023-02487 in Executive Session on 23 May 24 and 30 May 24:

, Panel Chair  
, Panel Member  
, Panel Member

A majority of the panel voted against correcting the record. XXXX voted to correct the record and did not provide a minority opinion. The panel considered the following:

- Exhibit A: Application, DD Form 149, w/atchs, dated 23 Jul 23.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, NGB/A1PS, w/atchs, dated 17 Feb 24.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 21 Feb 24.
- Exhibit E: Applicant's Response, w/atchs, dated 23 Feb 24.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by DAFI 36-2603, paragraph 4.12.9.

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Board Operations Manager, AFBCMR